

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH SPANO	:	DETERMINATION
		DTA NO. 817151
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1980 through February 28, 1982.	:	

Petitioner, Joseph Spano, 100 Evergreen Avenue, Staten Island, New York 10305, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through February 28, 1982.

The Division of Taxation, appearing by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion for dismissal of the petition on the ground that petitioner failed to file a petition with the Division of Tax Appeals within 90 days of the issuance of a conciliation order dismissing request.

The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Christina L. Seifert, Esq., with attachments, in support of its motion. Petitioner, appearing *pro se*, did not respond to the motion of the Division of Taxation. The Division of Taxation's motion was filed on October 19, 1999. Petitioner's response was due on November 18, 1999,¹ which date began the 90-day period for the issuance of this determination.

¹In determining the due date for petitioner's response pursuant to 20 NYCRR 3000.5(b), it was assumed that the motion of the Division of Taxation was served on the day it was filed.

Upon review of the pleadings, the previous order of this Administrative Law Judge, and the affidavits and other documents submitted in support of the motion of the Division of Taxation, Roberta Moseley Nero, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has proven that the conciliation order dismissing request mailed to petitioner in this matter was mailed to petitioner's last known address and if so, whether petitioner was able to overcome the presumption that he received the properly mailed order.

FINDINGS OF FACT

1. An order was previously issued in this matter on October 7, 1999 (*Matter of Spano*, Division of Tax Appeals, October 7, 1999). The order was the result of a Notice of Intent to Dismiss Petition issued by the Division of Tax Appeals. The order held that the Division of Taxation ("Division") had not proven that it had mailed the conciliation order dismissing request to petitioner's last known address. The order withdrew the Notice of Intent to Dismiss Petition and directed that this issue, and the issue of whether petitioner had received the conciliation order dismissing request, were to be the subject of a hearing to be scheduled.

2. Prior to a hearing on these issues being scheduled, the Division filed a motion to dismiss for lack of subject matter jurisdiction on the basis that the conciliation order dismissing request was properly mailed to petitioner's last known address and petitioner did not file a timely petition.

3. The prior order was based upon the fact that the address to which the conciliation order dismissing request was mailed (i.e., 2023 East 8th Street, Brooklyn, New York 11223) did not

match the address appearing on both the petition filed with the Division of Tax Appeals and the envelope containing the petition (i.e., 100 Evergreen Avenue, Staten Island, New York 10305).

The Division, in support of its current motion, submitted a copy of petitioner's request for conciliation conference dated April 6, 1998 and a copy of the envelope that contained the request. Both of these documents list petitioner's address as 2023 East 8th Street, Brooklyn, New York 11223. As found in the previous order, this is the address to which the Division mailed the conciliation order dismissing request on May 8, 1998.

4. Petitioner did not respond to the Division's motion. While petitioner included a statement in the petition stating that he had changed his address and had not received a copy of the conciliation order, he did not submit any evidence on this issue.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1),² petitioner had 90 days from the mailing of the Notice of Determination to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a)(a), to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). Petitioner chose the latter option, and a conciliation order dismissing the request dated May 8, 1998 was issued.

Pursuant to Tax Law § 170(3-a)(b) and (e) petitioner then had 90 days to file a petition with the Division of Tax Appeals. Counting 90 days from May 8, 1998, petitioner had until August 6, 1998 to file his petition. The petition was received on June 4, 1999 and the envelope containing the petition bore a United States Postal Service ("USPS") postmark of June 2, 1999. A petition delivered after the due date by the USPS will be deemed to be filed on the date of the

² Tax Law § 1138(a)(1) has been amended since the years in question. Such amendments did not affect the 90-day time requirement.

postmark (20 NYCRR 3000.22[a]). Therefore, the petition filed in this matter is deemed filed on June 2, 1999 which is approximately 10 months past the August 6, 1998 due date.

B. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue, in this case the conciliation order dismissing request, was properly mailed and when it was mailed. (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991.) This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of receipt by the taxpayer arises (Tax Law § 1147[a][1]; *Matter of T.J. Gulf v. New York State Tax Commn.*, *supra*). If the Division is unable to meet this burden, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Katz*, *supra*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

C. The previous order issued in this matter held that the Division had established the general mailing procedures for mailing of conciliation orders dismissing requests. However, it was found that the Division had not established that it mailed the particular conciliation order dismissing request to petitioner's last known address (*see*, Tax Law §1147(a)(1); *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). Specifically it was held that petitioner's address appeared in only three places in the record, on the Certified Mail Record ("CMR"), on the

petition and as the return address set forth on the envelope containing the petition. The address listed on the CMR did not match that utilized by petitioner in his petition or on the envelope containing the petition.

In support of the current motion the Division submitted a copy of petitioner's request for conciliation conference and the envelope which had contained the request. Both of these documents listed as petitioner's address 2023 East 8th Street, Brooklyn, New York 11223. As found in the previous order this was the address to which the Division mailed the conciliation order dismissing request.

Pursuant to 20 NYCRR 4000.7(a)(1) and (6) a conciliation order must be properly addressed. The Tax Appeals Tribunal has held that this means such an order must be mailed to a requestor's last known address as described in Tax Law § 1147(a)(1) (*Matter of Lantz*, Tax Appeals Tribunal, December 28, 1989; *Matter of Wilson, supra*). As relevant, Tax Law § 1147(a)(1) requires notices to be mailed to the person for whom they are intended at the address listed in either the latest return filed by, or application made by, that person. A request for conciliation conference is an application. In this case the address listed on such application filed in April of 1998 was the address used by the Division in mailing the conciliation order dismissing request in May of 1998, only a month later. Furthermore, there is no evidence in the record that petitioner notified the Division of a change in address prior to the issuance of the order. Therefore the Division has established that the order was mailed to petitioner's last known address (*see*, Tax Law §1147(a)(1); *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996).

D. As noted in the previous order, once the Division has proven the order was mailed to petitioner's last known address it will have proven proper mailing and a rebuttable presumption

of receipt will arise (*Matter of T.J. Gulf v. New York State Tax Commn., supra*).³ Petitioner may then introduce evidence to prove that he did not receive the conciliation order. However, merely asserting nonreceipt is insufficient to overcome the presumption that he received the properly mailed order (*Matter of T.J. Gulf v. New York State Tax Commn., supra; Matter of American Cars 'R' Us v. Chu*, 147 AD2d 795, 537 NYS2d 672, *Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

Petitioner did not respond to the motion of the Division and did not submit any evidence on the issue of whether he received the conciliation order dismissing request. The assertion in the petition that the order was not received is not enough to rebut the presumption of receipt.

E. Pursuant to Tax Law § 170(3-a)(b) and (e) and Tax Law former § 1138(a)(1), petitioner had 90 days from the mailing of the conciliation order to file a petition with the Division of Tax Appeals. Counting 90 days from May 8, 1998 results in an August 6, 1998 due date for the petition. The petition was filed on June 2, 1999, almost 10 months beyond the August 6, 1998 statutory deadline for filing the petition.

There being no timely petition, the Division of Tax Appeals is without jurisdiction to review the substantive arguments presented in the petition. (*Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989.)

³ Certain 1996 amendments to Tax Law § 1138(a)(1) may have created an irrebuttable presumption of receipt upon proof of proper mailing. However, since the 1996 amendments are applicable only to tax years commencing January 1, 1997 and thereafter, such amendments are not relevant to the current matter (L 1996, ch 267, § 3).

F. The motion of the Division of Taxation to dismiss the petition is granted and the petition of Joseph Spano is dismissed.

DATED: Troy, New York
January 20, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE